Roadway Express, Inc. *and* Darren King. Case 26–CA–18328

October 30, 1998

DECISION AND ORDER

BY MEMBERS FOX, LIEBMAN, AND BRAME

On July 24, 1998, Administrative Law Judge William N. Cates issued the attached bench decision. The General Counsel filed exceptions and a supporting brief and the Respondent filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions and to adopt the recommended Order.[1]

We agree with the judge that the General Counsel has not established that the Respondent's discharge of King was inconsistent with its treatment of employee Wayne Parimore, a union steward who was not terminated although he was allegedly absent from work while on "habitually absent status." The only evidence in the record concerning Parimore's alleged absences are attendance documents submitted by the Respondent, which purport to show that Parimore was absent from work on certain dates.[2] In some cases, the records do not indicate that the absence in question was excused.

However, the Respondent's terminal manager, Chuck Downing, testified without contradiction that the Respondent's records do not reflect in all cases whether an absence is excused or unexcused. Consistent with this testimony, the General Counsel conceded at the hearing that the records alone were insufficient to establish that an absence was unexcused and that "further explanation would be needed before you could place any real reliance on" the records. Because no witness testified concerning the circumstances of Parimore's absences, we find that the General Counsel has failed to prove that those absences were unexcused. Accordingly, we find no merit to the General Counsel's contention that King was treated less favorably than Parimore.[3]

[1] There are no exceptions to the judge's finding that the General Counsel established a prima facie case that the Respondent discharged employee Darren King because of his union or protected activities.

[2] Parimore was not called as a witness in this case. King's testimony that he had not seen Parimore at work on certain days does not establish that Parimore was absent on those dates, as the General Counsel failed to establish that King necessarily would have known who was present at work and who was not. A fortiori, King's testimony fails to establish whether any absences on Parimore's part were unexcused.

[3] As the judge noted, Parimore was the union steward for the Respondent's Memphis terminal and thus, like King, engaged in protected and union activities. Under these circumstances, we agree with the judge that, even if the General Counsel had established disparate treatment with respect to Parimore, it would have diminished weight as evidence that King was discharged for engaging in protected activities.

ORDER

The complaint is dismissed.

Jack L.Berger, Esq., for the General Counsel.
Parke S. Morris, Esq. and *Ross B. Clarke II, Esq.,* for the Respondent.

BENCH DECISION

STATEMENT OF THE CASE

WILLIAM N. CATES, Administrative Law Judge. I heard this case in trial proceedings conducted in Memphis, Tennessee, on July 1, 1998. At the conclusion of trial proceedings, and after oral argument by Government counsel and company counsel, I issued a Bench Decision pursuant to Section 102.35 (a)(10) of the National Labor Relations Board's Rules and Regulations, setting forth findings of fact and conclusions of law, including my ultimate conclusion that the complaint lacked merit and should be dismissed.

For the reasons (including credibility determinations) stated by me on the record at the close of the trial, I found Roadway Express, inc. (the Company) did not violate the National Labor Relations Act (the Act) when on or about May 23, 1997, it terminated its employee Darren King. Accordingly, I dismissed the complaint.

I certify the accuracy of the portion of the transcript, as corrected,[1] pages 180 to 193, containing my decision, and I attach a copy of that portion of the transcript, as corrected, as an "Appendix.''

Exceptions may now be filed in accordance with Section 102.46 of the Board's Rules and Regulations, but if they are not timely or properly filed, Section 102.48 provides that my Bench Decision shall automatically become the Board's decision and order.

CONCLUSIONS OF LAW

The Company is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and has not violated the Act in any manner alleged in the complaint.

On these conclusions of law, and on the entire record, I issue the following reccommended[2]

ORDER

The complaint is dismissed.

APPENDIX

DECISION

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. . . . .

First, let me state that it has been a pleasure to be in Memphis, Tennessee. I always enjoy coming here. Its a wonderful place not only for the fine accommodations and food but I have

[1] I have corrected the transcript by making physical inserts, crossouts, and other obvious devices to conform to my intended words, without regard to what I may have actually said in the passages in question. [Transcript corrections have actually been made.]

[2] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

always had the good fortune of working with fine Counsel in the Memphis area and that has been the case here. All Counsel are a credit to the position or positions they have taken in this case. Each of you came in here knowing what you wished to present and presented it and if you will reflect back over the trial I asked few if any questions in this proceeding and thats a credit to Counsel when you can develop the record completely and fully without the input of the Judge. I thank you.

I find that the charge in this proceeding was filed on October 21, 1997 and thereafter timely served on the Company. I find that the Company is a Corporation with an office and place of business in Memphis, Tennessee where it is engaged in the transportation of freight in Interstate commerce.

During a twelve month period ending February 28, 1998 the Company in conducting its business operations derived gross revenues in excess of $50,000.00 for the transportation of freight from the State of Tennessee directly to points outside the State of Tennessee; and

During that same time frame it performed services valued

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in excess of $50,000.00 in states other than the State of Tennessee. Based on that admitted information I find that the Company herein is an Employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

I find that the Highway and Local Motor Freight Employees Local Union No. 667 affiliated with the International Brotherhood of Teamsters, AFL–CIO is a labor organization within the meaning of Section 2(5) of the Act.

I find that Chuck Downing, Ricky Render, Jerry Everson, and Darrell Washington at all times applicable herein were supervisors and agents of the Company within the meaning of Section 2(11) and 2(13) of the Act.

It is at this point we come to the Complaint allegation with respect to the discharge of Darrell King alleged to have taken place on or about May 23, 1997. Let me state that the teachings of *Wright Line*, 251 NLRB 1083 [1980] must govern my analysis of this case.

Under *Wright Line* it is the General Counsels threshold burden to make a prima facia showing sufficient to support the inference that protected conduct was a "motivating factor" in the Employers decision.

Accordingly, lacking such a prima facia showing the Complaint can be dismissed on that basis alone. Likewise, it is only when such a showing can be found in the credible

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record that it may become necessary to the ultimate decision to determine whether the Employer has nevertheless made out a defense under *Wright Line*. That is to determine whether the Employer has nevertheless "demonstrated that the same action would have taken place even in the absence of the protected conduct".

The prosecution must establish the existence of four factual elements to satisfy its threshold burden under *Wright Line*, namely: The prosecution must show Union or protected activity, knowledge, animus, and adverse action.

Stated differently the General Counsel has the burden of proving that protected activity was at least a motivating factor in the Employers adverse employment decision. Having done so the burden shifts to the Employer to show that lawful reasons necessarily would have caused that decision.

The *Wright Line* burden of proof imposed upon the General Counsel may be sustained with evidence short of direct evidence of motivation. For example, inferential evidence arising from a variety of circumstances such as Union animus, timing, pretext.

Furthermore, it may be found that where the Employers proffered non-discriminatory motivational explanation is false even in the absence of direct evidence of motivation the trier of fact may infer unlawful motivation.

Motivation of Union animus may also be inferred from the

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record as a whole where an Employers proffered explanation is implausible or a combination of factors circumstantially support such an inference. Direct evidence of Union animus is not required to support such an inference. That is the applicable law that I will be applying in deciding this case.

First, a look at the facts. It appears that Mr. King commenced his employment with the Company herein in August of 1991 and he started out as either a casual or a temporary employee.

He was hired as a permanent dock worker on or about April 27, 1992. Now in that five or six years, depending on whether you count the casual and temporary time with the Company Mr. King, by his own estimate, filed approximately forty, maybe fifty grievances.

That would roughly amount to approximately eight to ten grievances per year on an average.

Mr. King in his employment years with the Company was discharged once in 1992, twice in 1994, once in 1995, and twice in 1996. Mr. King has had a somewhat turbulent relationship with the Company. However, he was returned to or continued his employment status after each of the above referenced six separations from the Company.

I specifically precluded the Parties from litigating the merits of the prior discharges and/or what, if any, compromises or settlements were brought about between the Company, Mr.

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King, and the Union to resolve any of those situations. Simply stated they were not pertinent to this proceeding other than as a historical background to the case.

It is not disputed that the applicable collective bargaining agreement provides for an employee being placed in a habitually absent status. That may be found at Article 46 of the collective bargaining agreement and starting perhaps on Page 160 and following.

The policy regarding habitually absent status requires an employee to complete five forty hour work weeks in an eight week period. A failure on an employees part to complete that attendance requirement, and after proper notification, the employee may be terminated if there are continued absences.

The applicable eight weeks in consideration herein run approximately from the week ending March 29, 1997 until approximately the week ending May 17, 1997. The two critical weeks therein it appears are the weeks ending April 19, 1997 and the week ending May 24, 1997.

Did the General Counsel establish a prima facia case with respect to the discharge of Mr. King—when I apply the rationale and analysis outlined in *Wright Line*. An examination of the elements persuades me he did. The first element of Union or protected activity I dont think its disputed by anyone that he had the grievance filing activities.

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Was the Company aware of his forty or so grievances. Yes, it is clearly demonstrated by the Companys participation in the grievance machinery that they were aware of his Union activities. Did they take adverse action against him. Yes, they did. They put him on habitual absence status and then notified him he was being terminated subject to or pending committee decision.

This action was conveyed in writing I think on May 27th. Ill come to that in a minute.

Has the General Counsel demonstrated any evidence of animus sufficient to establish at least a prima facia case here. Yes, I think he has on the record as a whole. An individual filing this number of grievances and having been discharged and his employment continuing for six separate discharges one could draw an inference that the Company might have some degree of animus against this individuals continued filing of grievances. I find that the General Counsel has established a prima facia and now I must look to see if the Company has demonstrated it would have taken the same action for lawful reasons that would have necessarily caused the same result.

I shall look at the facts surrounding that in chronological order. First, an examination of the Ft. Lauderdale, Florida grievance hearings and Mr. Kings efforts to get there. Was Mr. King timely notified of the meetings in

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Florida. The answer to that is very conclusively yes.

He was notified by the Union and that notification was received on April 11, 1997. That is reflected I think in General Counsel 3 or at least implicit in General Counsel 3. The letter that gave Mr. King his notice which he received on April 11 states that the matter pertaining to his and other grievances will come to be heard on April 16, 17, and/or 18, 1997 and a location was provided in Ft. Lauderdale, Florida and he was invited to attend if he wished to at his own expense.

That notification took place on Friday, April 11th. Im persuaded the evidence demonstrates that Mr. King perhaps worked on Sunday, April 13th, and was not scheduled to work on Monday, April 14, and Tuesday, April 15, 1997.

April 16, 1997 Mr. King reported for work and after about 2.43 hours, or a certain number of hours that morning, perhaps in excess of two but less than three Mr. King was reminded that his grievance involving his employment with this Company was taking place in Ft. Lauderdale, Florida at that very time or had the potential of taking place at that very time.

Mr. King states that after he got his memory refreshed by the Union Steward he left work and made certain efforts to be present at the hearings in Ft. Lauderdale, Florida that involved among other things his grievances.

Although it appears that he left work and placed a call

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at approximately 9:30 to the hotel where the Union representative was at Mr. King did not rent an automobile until shortly after 2:00 p.m. that afternoon.

Mr. King explained that he was having financial problems and he had to wait on his pay check before he could rent a car; and, then after renting the car at approximately 2:15 in the afternoon Mr. King still did not proceed driving from Memphis, Tennessee to Ft. Lauderdale, Florida until approximately midnight April 16th or the very first moments of April the 17th, 1997.

Mr. King testified he arrived in Ft. Lauderdale, Florida at approximately midnight on April 17, 1997 and did not proceed to the area where the grievances were actually being held until Friday morning, April 18, 1997 which would have been the final day that was scheduled for the hearings that involved certain of the grievances at issue herein.

At approximately 8:00 a.m. on April 18, 1997 Mr. King learns his grievances have been disposed of on April 17th and that they were held to the very last. They were the last grievances to be heard and they were heard, if not before noon, in the early hours afternoon on April 17, 1997.

Did Mr. King make a good faith effort to be at the grievance proceedings in Ft. Lauderdale, Florida, or stated differently did Mr. King exert the effort that a reasonable

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person would have been expected to exert in order to be present at the grievance meetings in Ft. Lauderdale, Florida such as it would be unlawful for the Company to take disciplinary action against him for being absent from work.

I find when applying the reasonable person and/or good faith effort standard Mr. King did not do so. I find he did not do so for the following reasons: He was notified in writing on Friday, April 11, 1997, that his case involving his employment would come up for a hearing April 16 to 18 yet he testified he forgot about it until he was reminded on April 16th. I find that explanation wanting.

No. 2, he placed a call to Ft. Lauderdale, Florida to try to see if he could get information as to whether his grievances had already been heard or whether he could get them to delay it until he got there but he did not speak to anyone in Florida. He simply left a message on an answering machine.

Now I dont question that he made the call and that he left the message on the answering machine but might a reasonable person have been expected to continue to pursue it until he had at least some understanding from the people presenting the grievance on his behalf.

Even after renting a car at approximately 2:15 p.m. on the 16th he still continued to delay his departure from Memphis, Tennessee until midnight. He states he was packing

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and making other arrangements. I find that explanation unpersuasive.

A prudent person or a reasonable person that was leaving even on Wednesday, April 16th, could have done his packing and making his arrangements on April 14, April 15, anytime after notification on April 11th.

Mr. Kings explanation that he waited to rent a car until he obtained his paycheck is also unpersuasive because it appears from the General Counsels Exhibit that the car was rented in someone elses name and was billed to a VISA card.

Now it is hard to explain why Mr. King acted in the manner he did when his employment future was on the line. I dont have an explanation as to why he would continue to expend his own private funds to go to Ft. Lauderdale, Florida and to go to the expense that he did.

I dont have an explanation for that but I am persuaded his actions as set forth in this record do not amount to a good faith effort on his part or that he conducted himself in a manner that a reasonable person might have been expected to act.

Again, let me state that I need not decide why he waited as he did and then proceeded as he did incurring substantial expenses other than to conclude his actions failed to demonstrate a good faith effort on his part such as to preclude the Company from disciplining him.

The next event of consequence in Mr. Kings eight week

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employment under review is in the week of May 24, 1997. Mr. King it appears took himself out of service with the Company on May 21, 1997 to go from Memphis, Tennessee to New Orleans, Louisiana for a grievance hearing involving among others himself.

It appears he left the Memphis, Tennessee area at approximately 5:00 p.m. on May 21, 1997 and arrived thereafter in New Orleans, Louisiana. He went to the grievance meeting that involved his grievance (or grievances) and all action involving him appears to have been completed by at least 3:00 p.m. on Thursday, May 22, 1997.

Mr. King did not return to work that day. Neither did he return for work on May 23, 1997, the date that resulted in his being notified on May 27, 1997 that he was being discharged for an unexcused absence on May 23, 1997 and that he was discharged pending committee action.

Mr. King explains that his departure from New Orleans on May 23, 1997 took place in the following manner: He states that he checked out of his motel in New Orleans on May 23 at approximately 10:45 a.m.. However, he went back to his room and continued to pack and prepare to leave New Orleans and did not leave New Orleans, Louisiana heading back to Memphis, Tennessee until approximately noon on that day.

Mr. King explains that he arrived back in Memphis, Tennessee after 7:00 p.m. on May 23, 1997 and perhaps as late

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as somewhere between 9:00 and 10:00 p.m. on that date. He said he was delayed in his return for among other reasons that he took a wrong exit on the Interstate and to correct that problem he incurred perhaps as much as a one to two hour delay and that it took him as much as a hundred miles out of his way.

He explained that he had taken himself out of service on May 21, 1997 and had not placed himself back in service as of May 23, 1997. Again, was the Company justified in taking the action it did? Stated differently were the actions of Mr. King related to his taking himself out of service, or putting himself back in service actions that a reasonable person would have been expected to have done?

Im persuaded that Mr. Kings actions are such that the Company may not be considered to have violated the law, the law being the National Labor Relations Act, by taking the action it did against Mr. King.

Mr. King, after he took himself out of service on May 21, had an obligation to place himself back in service at some point when his efforts in New Orleans regarding his grievance activity was concluded. His grievance activities were concluded by 3:00 p.m. on May 22nd.

Now assuming that he was tired and exhausted from his drive from Memphis, Tennessee to New Orleans, Louisiana no

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explanation is offered as to why he could not have rested up between 3:00 p.m. and the next day at some reasonable hour in the morning.

No explanation was offered as to why he delayed departing New Orleans, Louisiana on the return trip back to Memphis, Tennessee until at least noon on May 23rd on a day that he knew it could be reasonably expected that he report to work that evening in Memphis, Tennessee.

The explanation that he lost an hour or two and perhaps as much as a hundred miles by taking a wrong exit I find unpersuasive. Im persuaded that after a reasonable rest from 3:00 p.m. on the 22nd until sometime on May 23rd would have been sufficient to have allowed Mr. King to return to Memphis, Tennessee within the approximately six and a half hours it was testified it would take someone to drive back.

I find a reasonable person would have been expected to return during that period of time. Was it reasonable for the Company to expect Mr. King to return to the extent that they need not excuse his absence and still not run afoul of the law? Im persuaded they could do so.

Finding both of the absences the Company relied on to discharge Mr. King appear not to have been for other than justifiable business reasons I then must look at the issue did the Company treat Mr. King in a disparent manner in disciplining him when his discipline is compared with Mr.

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Parimores.

Based on the status of this record I am not persuaded the Company treated Mr. King in a disparent manner for the following reasons: Mr. Parimore was a Union Steward and if this unionized Company was out to punish employees for being Union or utilizing the grievance arbitration procedures would it not have discharged Union Steward Parimore also?

The Company offered certain explanations for its actions related to Parimore as are set forth in General Counsel Exhibits 5. The reason I say Exhibits 5 there is a 5, a, b, c, and d. Such does not fully explain the Companys actions with respect to Mr. Parimore but it does place the Companys actions with respect to him in a light that precludes me from concluding the Company treated Mr. King in a manner differently than it did Mr. Parimore.

I shall therefore dismiss the Complaint and I do so. This trial is closed.

(Off the record.)

(Whereupon, the hearing in the above entitled matter was closed.)